United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Docket No. 77-7116

B

P/S

In The

United States Court of Appeals

For the Second Circuit

DIVISION 580, AMALGAMATED TRANSIT UNION, AFL - CIO,

Appellant,

— *vs.* —

CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY, 508 Midtown Plaza, Syracuse, New York, *et al.*,

Appellees.

On Appeal of An Interlocutory Order Denying Injunction From the Federal District Court, Northern District of New York

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

APPELLANT'S BRIEF

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TABLE OF CONTENTS

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE

I. NATURE OF THE CASE 1

II. COURSE OF PROCEEDINGS AND DISPOSITION 2

III. STATEMENT OF FACTS 5

JURISDICTIONAL STATEMENT 9

A. The Action Arises Under the Urban Mass Transportation Act of 1964, As Amended 9

B. The Action Arises Under 42 U.S.C. §1983 . . . 18

ARGUMENT

POINT I

THE DISTRICT COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO ISSUE AN INJUNCTION HEREIN 20

A. The Union Will Succeed on the Merits of the Case 20

1. The Parties Have Agreed to Arbitrate Equitable Defenses to Arbitration, Including Waiver 24

2. The Waiver Defense Raises Issues of Procedural Arbitrability, Which Are Solely for the Arbitrator 26

3. The Union's Participation in Mediation Is Not, As a Matter of Law, A Waiver of the Right to Arbitration . . . 27

B. The Union Will Suffer Irreparable Harm If An Injunction Does Not Issue Herein . . . 30

1. Loss of Collective Bargaining Rights 31

2. Loss of Right to Arbitrate 33

C. The Authority Will Suffer No Harm If An Injunction Issues Herein 34

POINT II

THE FAILURE OF THE DISTRICT COURT TO RENDER A JUDGMENT COMPELLING ARBITRATION, BY CONSOLIDATING THE TRIAL ON THE MERITS WITH THE HEARING ON THE APPLICATION FOR A PRELIMINARY INJUNCTION, IS ERRONEOUS AS A MATTER OF LAW AND AN ABUSE OF DISCRETION 34

A. This Court Should Render a Decision on the Merits of the Case 35

B. The Merits of this Case, Fully Exhibited on the Record, Demonstrate That Arbitration Must Be Compelled 36

1. The Intent of the Parties Cannot Bar Arbitration 39

2. Expiration of the Underlying Collective Bargaining Agreement Cannot Bar Arbitration 40

3. Whether the 13(c) Agreement Has Been Superceded Cannot Bar Arbitration 41

4. The Waiver Defense Cannot Bar Arbitration 43

POINT III

PENDENT JURISDICTION SHOULD HAVE BEEN EXERCISED HEREIN TO ORDER THE ENTIRE DISPUTE TO ARBITRATION 44

A. The District Court Possesses Pendent Jurisdiction Over the Union's Claim In This Case 44

B. The Instant Dispute Should Have Been Ordered to Arbitration Pursuant to New York State Law 45

CONCLUSION 52

APPENDIX

NEW YORK CIVIL SERVICE LAW §209 53

CITATIONS

CASES: Page

Beatham v. Manson, 369 F.Supp. 783 (1973) 19

Board of Regents v. Roth, 408 U.S. 564 (1972) 19

Bressette v. International Talc Co., Inc., 527 F.2d 211, 91 LRRM 2077 (2d Cir. 1975) 41

Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry. Co., 314 F.2d 424, 52 LRRM 2595 (8th Cir.), cert. denied, 375 U.S. 819, 54 LRRM 2312 (1963) 13

Carcich v. Rederi A/B Nordie, 389 F.2d 692 (2d Cir. 1968) 27, 29

Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir. 1969) 20

City of Amsterdam v. Helsby, 37 N.Y.2d 19, 89 LRRM 2871 (1975) 19, 47

City of Owensboro v. Cumberland T. & T. Co., 174 F. 739 (6th Cir. 1909) 35

The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883) 18

Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953) 19

Controlled Sanitation Corp. v. Machinists, 524 F.2d 1324, 90 LRRM 2892 (3rd Cir. 1975), cert. denied, 424 U.S. 915, 91 LRRM 2410 (1976) 25

Granny Goose Foods, Inc. v. Teamsters, ____ F.Supp. ____, 88 LRRM 2029 (N.D.Cal. 1974) 24

Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968) 19

ITT, Inc. v. Communications Workers, 422 F.2d 77, 73 LRRM 2244 (2d Cir. 1970) 28

CASES: - continued

IUOE, Local 139 v. Carl A. Morse, Inc., 387 F.Supp. 153, 88 LRRM 2680 (E.D.Wisc. 1975) 25

Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968) 9

John Wiley & Sons v. Livingston, 376 U.S. 543, 55 LRRM 2769 (1964) 26

Local 4, IBEW v. Radio Thirteen-Eighty, Inc., 469 F.2d 610, 81 LRRM 2829 (8th Cir. 1972) 40

Local 198, Rubber Workers v. Interco, Inc., 415 F.2d 1208, 72 LRRM 2377 (8th Cir. 1969) 28

Local 1434, IBEW v. E.I. duPont Co., 350 F.Supp. 462, 81 LRRM 2678 (E.D.Virg. 1972) 25

Louisville & Nash. R.R. Co. v. Garrett, 231 U.S. 298, 34 S.Ct. 48 (1913) 19

Louisville & Nash. R.R. Co. v. Mottley, 211 U.S. 149 (1908) 17

Machinists v. Central Airlines, 327 U.S. 687 (1963) 15, 16, 17

Machinists v. General Electric Co., 406 F.2d 1046, 70 LRRM 2477 (2d Cir. 1969) 21, 40

Matter of Long Island Lumber Co. (Martin), 15 N.Y.2d 380, 59 LRRM 2237 (1965) 45

McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424 (2d Cir. 1965), cert. denied, 382 U.S. 1026, 86 S.Ct. 643 (1966) 10

Monroe v. Pape, 365 U.S. 167 (1961) 18

N.L.R.B. v. Baltimore Transit Co., 140 F.2d 51, 13 LRRM 739 (4th Cir. 1944) 31

Operating Engineers v. Flair Builders Inc., 406 U.S. 487, 80 LRRM 2441 (1972) 24, 26

Operating Engineers v. Flair Builders, 440 F.2d 557, 76 LRRM 2595 (7th Cir. 1971), reversed, 406 U.S. 487, 80 LRRM 2441 (1972) 26

CASES: - continued

Perry v. Sindermann, 408 U.S. 593 (1972) 19

Reid Burton Construction v. Carpenters, 535 F.2d 598, 92 LRRM 2321 (10th Cir. 1976) 24

Steelworker's Trilogy, 363 U.S. 564, 46 LRRM 2414 (1960) 46

Susquehanna Valley Central School District v. Susquehanna Valley Teachers' Association, 46 A.D.2d 104, 88 LRRM 3320 (3rd Dep't. 1974), aff'd., 37 N.Y.2d 614, 90 LRRM 3046 (1975) 29, 46, 48, 50

T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964) 9

United Mine Workers v. Gibbs, 383 U.S. 716, 61 LRRM 2651 (1966) 44

United Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 LRRM 2414 (1960) 29, 36

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 46 LRRM 2416 (1960) 17, 21, 39

Zeller v. Board of Higher Education, 91 LRRM 2854 (N.Y.Sup.Ct. N.Y. Co., 1975) 51

CONSTITUTION, STATUTES AND RULES:

United States Constitution

Article 1, Section 10, Clause 1 . . . . 2, 9, 18, 19, 44

Fourteenth Amendment 2, 9, 18, 19

Civil Rights Act of 1871

§1 [42 U.S.C. §1983] 1, 9, 18, 44

Interstate Commerce Act

§5(2)(f) [49 U.S.C. §5(2)(f)] 13, 14

Labor-Management Relations Act

§1 [29 U.S.C. §151] 31

CONSTITUTION, STATUTES AND RULES: - continued

New York State Civil Service Law

§200 47

§201 33

§205 49

§209 . . . . . 1, 2, 3, 8, 9, 18, 20, 29, 30, 32, 33, 47, 48, 49

Railway Labor Act

§204 [42 U.S.C. §184] 15

Urban Mass Transportation Act of 1964, as amended

§2 [49 U.S.C. §1601] 10

§3 [49 U.S.C. §1602] 13, 15

§13(c) [49 U.S.C. §1609(c)] . . 1, 2, 5, 6, 7, 9, 10, 11, 12, 13, 15, 16, 18, 29, 31, 32, 33, 44

28 U.S.C. §1331 . . . . . 9, 17

28 U.S.C. §1337 . . . . . 9, 17

28 U.S.C. §1343 . . . . . 9, 20

Fed.R.Civ.Proc., Rule 65(a)(2) 1, 34, 35

Rules and Regulations of the N. Y. Public Employment Relations Board, §205.2 50

LAW REVIEWS:

Barnum, From Private to Public: Labor Relations In Urban Transit, 25 Ind. & Lab. Rel. Rev. 95 (1971) 13

Barnum, National Public Labor Relations Legislation: The Case of Urban Mass Transit, 27 Lab. Law. J. 168 (1976) 12

LAW REVIEWS: - continued

Cohn, The Broken Compass: The Requirement That A Case Arise "Directly" Under Federal Law, 115 U. Pa. L.Rev. 890 (1967) 17

Newman, Interest Arbitration - Practice and Procedure, 1977 ABA Section of Labor Relations Law, Labor Relations Section 44 (1977) 43

MISCELLANEOUS:

H.R. Rep. No. 204, 88th Cong. 2d Sess. 2569 . . . . . 10, 17

88 Cong. Rec. 5670 (1963) 11, 37

88 Cong. Rec. 5671 (1963) 11

88 Cong. Rec. 5662 (1963) 12

88 Cong. Rec. 5677 (1963) 32

88 Cong. Rec. 5684 (1963) 12, 29

Roberts, Roberts' Dictionary of Industrial Relations 74 (Rev'd. 3d. 1971) 31

APPELLANT'S BRIEF

STATEMENT OF THE ISSUES

1. WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO ISSUE A PRELIMINARY INJUNCTION.

2. WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN FAILING TO IMMEDIATELY ORDER THE ENTIRE DISPUTE TO ARBITRATION.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from the District Court's refusal to issue a preliminary injunction. The injunction sought would restrain the Appellees from pursuing factfinding and from imposing a settlement of the dispute upon the Appellant, allegedly pursuant to Section 209 of the New York Civil Service Law.

This is also an appeal from the District Court's failure to immediately order arbitration of the entire dispute, pursuant to the parties' arbitration agreement. The District Court should have consolidated the trial on the merits with the hearing on the preliminary injunction application, pursuant to Rule 65(a)(2) of the Fed.R.Civ.Proc.

The underlying case is an action to compel arbitration pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as amended [49 U.S.C. §1609(c)]. It is also an action, pursuant to Section 1 of the Civil Rights Act of 1871 [42 U.S.C. §1983],

to redress deprivations of Federal rights under color of State law. Certain Appellees, directors, officers and employees of a public authority are, under color of Section 209 of the New York State Civil Service Law, depriving Appellant of its rights secured by: Section 13(c) of the Urban Mass Transportation Act [concerning protection of employees affected by federal aid afforded under 49 U.S.C. §1602]; the Fourteenth Amendment to the U. S. Constitution [concerning arbitrary deprivation of property without due process]; and Article 1, Section 10, Clause 1 of the U. S. Constitution [concerning legislative impairment of contracts].

Finally, this is also an action to compel arbitration pursuant to New York State law. Jurisdiction of this claim is invoked pursuant to the doctrine of pendent jurisdiction.

II. COURSE OF PROCEEDINGS AND DISPOSITION

This action was commenced on February 7, 1977, when Appellant, Division 580, Amalgamated Transit Union, AFL-CIO ["Union"], filed its complaint with the Federal District Court, Northern District of New York [A 29-45].* The relief sought, in essence, is a judgment compelling the Authority Appellees [hereinafter the "Authority"]** to arbitrate a certain dispute with the Union.

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* References in this form are to the pages of the Appendix.

** The Authority Appellees, consisting of the Central New York Regional Transportation Authority, CNY Centro, Inc., Centro of Oswego, Inc., Centro of Cayuga, Inc., and various officers and directors thereof, are the employers of the Union's members.

To protect its rights during the pendency of the action, the Union sought temporary and preliminary injunctive relief to restrain Appellees from employing impasse resolution procedures contained in New York Civil Service Law §209. Those procedures consist of factfinding, followed by the Authority's imposition of a resolution of the dispute on the Union. The resolution would be imposed without the Union's consent.

On February 7, 1977, the Honorable Lloyd F. MacMahon, United States District Judge,* granted an order to show cause with a temporary restraining order, enjoining the aforesaid procedures from being pursued [A 17-20]. Judge MacMahon thus enjoined the PERB Appellees**:

> [F]rom causing the impasse resolution procedures set forth in New York Civil Service Law §209 to be commenced or conducted, and from commencing or conducting a factfinding hearing concerning the present dispute over the terms of a new collective bargaining agreement between Defendants CNY Centro, Inc., Centro of Oswego, Inc., and Centro of Cayuga, Inc., and Plaintiff . . . . [A 19].

On February 9, 1977, the Union's motion for a preliminary injunction was heard by Judge MacMahon. At the close of oral argument, the Judge rendered his decision. He ruled in part that:

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* Of the Southern District of New York, sitting by designation.

** The "PERB Appellees" consist of Robert D. Helsby, Joseph R. Crowley and Ida Klaus, together constituting the New York State Public Employment Relations Board.

> [I]t is plain that under the very language of this agreement interest disputes of the kind that we have here looking to renewal or maintenance of collective bargaining agreement are clearly covered. Likewise, the Court feels confident that the very purpose of this 13(c) agreement is to assure that . . . labor disputes or disputes of this type . . . as well as others would be submitted to . . . binding arbitration, with a view that there be no interruption of the public service in all of these systems of mass transportation, and that when the Federal Government took over these private systems* that the public interest in uninterrupted services would be best preserved by compulsory arbitration. Certainly, that isn't any novel concept in Federal Law. It has long been the thesis underlying the Railway Labor Act, to mention only one phase of it as well as the National Labor Relation Act. But, in the field of transportation, the Federal Government certainly in the field of Federal Interstate Transportation feels that there should be various mediation factfinding procedures and ultimately binding arbitration. The words that the amendment to this agreement I think on its face has a saving clause that prevents any superceding or loss of prior rights concerning labor disputes and arbitration.
>
> . . .
>
> I therefore think that the union is entitled to go to arbitration in this matter . . . . [Emphasis added] [A 11-13].

The court, however, held that by participation in certain mediation procedures, the Union had waived its right to arbitration under the 13(c) Agreement. [A 13-14]. Accordingly, the court refused to grant the preliminary relief sought, since it found that the Union had "failed to make a clear showing of either

---

* Probably should read "that when local governments took over these private systems with Federal monies . . ."

(1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward plaintiff." [A 5].

On March 2, 1977, the Union filed its notice of appeal herein [A 3-4].* At the same time, the Union moved the District Court for an injunction and/or stay pending appeal [A 237], which motion was denied [A 299].

Finally, on March 7, 1977, the Union moved this Court for an injunction and/or stay pending appeal, which also was denied. The Court, however, ordered the appeal expedited, and granted the Union leave to renew its motion if it appeared that a legislative resolution of the dispute would be imposed prior to the decision on the pending appeal.

III. STATEMENT OF FACTS

On the 11th day of March, 1975, the Union and the Authority, pursuant to §13(c) of the Urban Mass Transportation Act of 1964, as amended [49 U.S.C. §1609(c); hereinafter the "Act"], entered into an agreement to arbitrate all of their disputes, including disputes over the terms to be incorporated into a new collective

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* On February 10, 1977, the Authority moved to dismiss the complaint or for summary judgment [A 183]. The Union, thereupon, cross-moved for summary judgment [A 188]. On February 21, 1977, Judge MacMahon denied all motions [A 234].

bargaining agreement, i.e., interest arbitration. [A 46-57]. The Authority has and continues to refuse to arbitrate the instant dispute over a new collective bargaining agreement.

Prior to March 11, 1975, the Authority filed applications under the Act to obtain federal capital grants. The Authority wished to use those grants to assist them in, inter alia: purchasing the assets of the Syracuse and Eastern Transit Corporation (the past employer of the Union's members); purchasing buses, bus shelters and other equipment; and constructing bus transportation facilities. [A 34].

To obtain those grants, the Authority was obligated, pursuant to §13(c) of the Act, to enter into "fair and equitable arrangements" with the Union to protect the Union's members. Section 13(c) of the Act provides that:

> It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against

> a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements. [Emphasis added].

Thus, pursuant to said §13(c), the Authority entered into an agreement with the Union to arbitrate all of their disputes. That Agreement provides in relevant part that:

> (9) In the case of any labor dispute where collective bargaining does not result in agreement, the same may be submitted at the written request of either party to a board of arbitration, composed of three (3) persons, to be selected as provided by the collective bargaining agreement then in effect, if any, otherwise the same may be submitted at the written request of either party to a board of arbitration composed of three (3) persons as hereinafter provided, one to be chosen by Centro, one to be chosen by the Union, and the two thus selected to select a third disinterested arbitrator; the findings of the majority of said board of arbitration to be final and binding on the parties thereto, except in the event of a tripartite arbitration, in which case the decision of the neutral member shall govern.
>
> . . .
>
> The term "labor dispute" shall be broadly construed and shall include any controversy concerning wages, salaries, working conditions or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, the making or maintenance of collective bargaining agreements, the terms to be included in such agreements, the interpretation or application of such agreements, the adjustment of grievances, any claim, difference, or controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Project. [A 49-50].

The said 13(c) Agreement is still binding upon the parties.

In or about 1976, the parties commenced negotiations for a new collective bargaining agreement. As part of those negotiations, and in an effort to resolve the matter by voluntary agreement short of arbitration, the Union participated in mediation procedures. A mediator, supplied by the PERB Appellees, held sessions on October 29, 1976, October 30, 1976, and November 5, 1976. [A 63].

On November 17, 1976, i.e., as soon as it became evident that mediation had failed, the Union demanded arbitration of the dispute pursuant to Section 9 of the 13(c) Agreement [A 197, 200]. The Authority refused and, instead, sought the appointment of a factfinder [A 63]. When it became clear that the Authority would not accede to the Union's demand, the Union commenced the instant action seeking, in essence, to compel arbitration.

To protect its rights during the pendency of this suit, the Union applied for a preliminary injunction to enjoin the aforesaid factfinding and to prevent a resolution of the dispute from being imposed upon it by the Authority. (Pursuant to New York Civil Service Law §209, in the absence of an agreement to arbitrate such interest disputes, the Authority may impose a new collective bargaining agreement on the Union).

As described supra, the relief sought by the Union was denied. Thus, pursuant to the direction of Judge MacMahon, the Union participated, and continues to participate, in factfinding. No legislative resolution has yet been imposed upon the Union.

JURISDICTIONAL STATEMENT

This action arises under the Urban Mass Transportation Act since the action is controlled by the policies and construction of the Act. Therefore, federal subject matter jurisdiction exists pursuant to: 28 U.S.C. §1331 (the matter in controversy exceeds $10,000.00); and 28 U.S.C. §1337 (the Act regulates commerce).

The action also arises under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, since the Authority's directors, officers and employees are, under color of Section 209 of the New York State Civil Service Law, depriving the Union of rights secured by: Section 13(c) of the Act; the Fourteenth Amendment to the U. S. Constitution; and Article 1, Section 10, Clause 1 of the U. S. Constitution. Therefore, Federal subject matter jurisdiction also exists pursuant to 28 U.S.C. §1343.

A. The Action Arises Under the Urban Mass Transportation Act of 1964, As Amended.

An action arises under federal law, pursuant to 28 U.S.C. §§1331 and/or 1337, when: a distinctive policy of an Act of Congress requires that federal principles control the disposition of the claim; or the claim presents an issue requiring construction of an Act of Congress. [Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486, 493 (2d Cir. 1968); see, also, T. B. Harms Co. v. Eliscu, 339 F.2d 823, 825-826, 828 (2d Cir. 1964);

McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424 (2d Cir. 1965), cert. denied, 382 U.S. 1026, 86 S.Ct. 643 (1966)].

In the instant case, the distinctive policies of the Act, to protect employees' collective bargaining rights and promote labor peace, control the disposition of the Union's claim. Furthermore, the construction of Section 13(c) of the Act is at issue. Thus, this action arises under the Urban Mass Transportation Act of 1964, as amended.

The Urban Mass Transportation Act was enacted to, inter alia, assist in the development and improvement of urban mass transportation facilities [§2 of the Act; 49 U.S.C. §1601] [See, also, H.R. Rep. No. 204, 88th Cong. 2d Sess. 2569]. Congress proposed to achieve these purposes: (1) by providing federal financial assistance; (2) by protecting the collective bargaining rights of employees affected by federal assistance; and (3) by promoting labor peace. It is the latter two policies that control the disposition of the instant action.

In passing the Act, Congress expressed deep concern over the impact of federal assistance on the employees of private transit companies. The concern was twofold: that federal monies would be used to purchase private transit companies, thereby voiding or restricting the employees' collective bargaining rights; and that labor unrest would then inhibit the national program to improve mass transportation systems.

Speaking against the use of federal monies to restrict col-

lective bargaining rights, and in support of Section 13(c) of the Act, Senator Morse observed that:

> In my judgment, we cannot justify, as a matter of public policy, the use of Federal dollars by a local community or a governmental unit thereof to be spent for development of a transit system, the expenditure of which would result in worsening the present collective bargaining rights of free labor which operates that transit system. [88 Cong. Rec. 5671 (1963)].

And, addressing himself to the problems of labor unrest, Senator Morse advised that:

> As we know, any legislation which is intended to provide Federal aid for the purpose of strengthening and improving our urban area mass transportation systems must be concerned with another highly important factor, the stability of labor relations. It is a necessary corollary of any such consideration that there be provisions which would safeguard employee rights and promote and maintain the national labor policy with a view toward insuring labor relations stability and promoting employee morale. [88 Cong. Rec. 5670 (1963)].

Based upon these propositions, Congress passed the Act, including Section 13(c). That Section, designed to protect employees' collective bargaining rights and to promote labor peace, provides that:

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continu-

> ation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

It is relevant to note Senator Morse's explanation of the import of Section 13(c). He observed that under the Act, no federal moneys would be made available to localities that restricted collective bargaining rights of public employees. Thus, he stated that:

> The State can continue its State policy if it wishes to; but in the judgment of the Senior Senator from Oregon, the State should not be allowed to receive Federal money with which to continue a policy that is in conflict with sound Federal policy [i.e., federal labor policy guaranteeing collective bargaining rights]. [88 Cong. Rec. 5672 (1963)].
>
> I want to be very frank as I say this today: In rare cases in which local law prohibits collective bargaining, Federal money would not be available, because it would be in conflict with the policy of the bill. [88 Cong. Rec. 5684 (1963)].*

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* The impact of Section 13(c) of the Act on State labor laws is detailed in a study financed by the Urban Mass Transportation Administration, U. S. Department of Transportation and the Industrial Research Unit, Wharton School, University of Pennsylvania. The study found that State labor policies have been replaced by a uniform federal mandate for collective bargaining in publicly owned transit systems. Barnum, National Public Labor Relations Legislation: The Case of Urban Mass Transit, 27 Lab. Law J. 168, 175 (1976).

In the instant case, the Authority qualified for federal monies pursuant to Section 3 of the Act by entering into a 13(c) Agreement with the Union. That Agreement, providing for interest arbitration, was also entered into to protect the collective bargaining rights of the employees affected by the receipt of federal monies and to promote labor peace.* That is, it was entered into to effectuate the policies ennunciated by Section 13(c) of the Act.

Since it is the federal policies ennunciated by the Act that mandate the protective arrangements, it is federal policy that controls the disposition of this action. Simply put: The Authority's violation of the 13(c) Agreement also violates Section 13(c) of the Act. Thus, this case arises under the Act.

In a case analogous to the one at bar, it was held that an action to declare rights and obligations under an agreement entered into pursuant to Section 5(2)(f) of Title 49, United States Code, was an action arising under that federal law. [Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry. Co., 314 F.2d 424, 52 LRRM 2595 (8th Cir.), cert. denied, 375 U.S. 819, 54 LRRM 2312 (1963)].

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* Interest arbitration provisions are common in the industry, having played a major role in its labor relations' history. The history of labor relations in the urban transit industry, from its inception through the Urban Mass Transit Act, is detailed in a study financed by the Urban Mass Transportation Administration, U. S. Department of Transportation. Barnum, From Private to Public: Labor Relations In Urban Transit, 25 Ind. & Lab. Rel. Rev. 95 (1971).

Said Section 5(2)(f), referred to in Section 13(c) of the Act, also requires employers to enter into arrangements to protect certain employees. That section provides in part that:

> As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment . . . .

The court in that case held that federal jurisdiction existed to review and, obviously, enforce agreements entered into under that section. The court, at 428, 52 LRRM, at 2597, explained:

> Defendants' first point, to the effect that the court lacks jurisdiction, is without merit. The trial court states in its opinion, "The problem is not one of interpretation, of collective agreements, but as heretofore set out, primarily involves the interpretation and effect of Section 5(11) of the Interstate Commerce Act on an agreement for the protection of employees approved by the Interstate Commerce Commission under Section 5(2) of the Act."
>
> 28 U.S.C.A. §1337 confers jurisdiction upon federal courts over actions arising under any act of Congress regulating commerce. We agree with the contention of the parties that Gully v. First National Bank, 299 U.S. 109, prescribes the rules to be applied in determining whether an action arises under the provisions of the Interstate Commerce Act and the Railway Labor Act. Gully thus states the test of jurisdiction: "The right or immunity must be such that it will be supported if the Constitution or

> laws of the United States are given one construction or effect, and defeated if they receive another." 299 U.S. 112. The problem of statutory construction here presented is a substantial one and fully satisfies the Gully test. [Emphasis added].

Similarly, in the case at bar, the problem is the interpretation and effect of Section 3 of the Urban Mass Transportation Act on an agreement for the protection of employees approved by the Secretary of Labor under Section 13(c) of the Act.

In another analogous case, the Supreme Court held that an employer's breach of an agreement entered into pursuant to Section 204 of the Railway Labor Act [42 U.S.C. §184] was redressable in the federal courts [Machinists v. Central Airlines, 372 U.S. 682 (1963)]. That statute makes it the duty of every employer to enter into arbitration agreements with its unions.

The Court observed, at 690-91, that:

> "The extent and nature of the legal consequences" of this duty "though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of §204 and are consistent with the Act and its purposes. It is federal law which would determine whether a §204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under §204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were

struck down even though in furtherance of the federal scheme. [Emphasis added; citations omitted].

> If any provision contained in a §204 contract is enforceable, it is because of congressional sanction: "[T]he federal statute is the source of the power and authority . . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction. . . . A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it . . . ." Railway Dept. v. Hanson, 351 U.S. 225, 232. That is, the §204 contract, like the Labor Management Relations Act §301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts. [Emphasis added].

Similarly, Section 13(c) of the Urban Mass Transportation Act required the Authority to enter into an agreement for:

> (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
> (2) the continuation of collective bargaining rights . . . .

Thus, if any provision contained in the 13(c) Agreement is enforceable, it is because of congressional sanction. As in the Machinists case, supra,

> "The federal statute is the source of the power and authority . . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction . . . ."

It is also observed that the construction of Section 13(c) of the Act is directly in issue. For instance, the Authority asserts that the 13(c) Agreement expired since it was only entered into

to obtain federal monies. Once it obtained those monies, the Authority apparently claims that its obligation under the agreement expired.

Thus, the construction of Section 13(c) of the Act is directly in issue, the issue being when, under the Act, a 13(c) agreement expires.* That issue, of course, is a Federal one governed by Federal policies. [See, e.g., Machinists v. Central Airlines, supra].

Thus, since this action arises under an Act of Congress, the Urban Mass Transportation Act of 1964, and since there is more than $10,000.00 in controversy, Federal subject matter jurisdiction exists pursuant to 28 U.S.C. §1331

Finally, it is observed that the Act is an Act of Congress regulating commerce [See, H.R. Rep. No. 204, 88th Cong. 2d Sess. 2572-2573]. Therefore, Federal subject matter jurisdiction also exists pursuant to 28 U.S.C. §1337.

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* Under the much disputed "well pleaded complaint" rule [see, Cohn, The Broken Compass: The Requirement That A Case Arise "Directly" Under Federal Law, 115 U. Pa. L.Rev. 890, 893-95 (1967)], this action arises under the Act since a necessary element of the action is the existence and validity of the agreement at issue. See, Louisville & Nash. R.R. Co. v. Mottley, 211 U.S. 149 (1908); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582, 46 LRRM 2416, 2419 (1960).

B. The Action Arises Under 42 U.S.C. §1983.

Section 1983 of Title 42, United States Code provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Authority's directors, officers and employees are, under color of New York State Civil Service Law §209, depriving the Union of rights secured by the laws and Constitution of the United States, i.e., Section 13(c) of the Urban Mass Transportation Act of 1964; the Fourteenth Amendment to the U. S. Constitution; and Article 1, Section 10, Clause 1 of the U. S. Constitution.

The Authority's directors, officers and employees, Appellees herein, are acting under color of State law because their activities constitute State action and they are allegedly acting pursuant to New York State Civil Service Law §209. [See, Monroe v. Pape, 365 U.S. 167 (1961); The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883)].

These public officials are depriving the Union and its members of rights secured by Section 13(c) of the Urban Mass Transportation Act, to wit, the continuation of collective bargaining rights. That Act, of course, is a law of the United States.

These public officials are also depriving the Union and its members of their property interest in the 13(c) Agreement and in

its enforcement, without due process of law. Thus, by their arbitrary and capricious violation of the 13(c) Agreement, the said public officials are also violating the Fourteenth Amendment to the U. S. Constitution. [See, Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968); Beatham v. Manson, 369 F.Supp. 783, 791 (1973)].

Finally, these public officials are also impairing the obligation of the 13(c) Agreement (contract) by legislative action and are thus depriving the Union of rights secured under Article 1, Section 10, Clause 1 of the U. S. Constitution. The orders of the Authority are laws within the meaning of that Article [see, Louisville & Nash. R.R. Co. v. Garrett, 231 U.S. 298, 34 S.Ct. 48 (1913); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 27, 89 LRRM 2871, 2872 (1975) (power to regulate terms and conditions of public employment has been constitutionally delegated by the New York State legislature pursuant to New York Civil Service Law)]. Thus, in imposing a contract on the Union, the Authority impairs rights under the 13(c) Agreement in violation of Article 1, Section 10, Clause 1 of the U. S. Constitution [See, Cobb v. City of Malden, 202 F.2d 701, 705 (1st Cir. 1953)].

It is submitted, therefore, that the actions of the Authority, its directors, officers and employees, deprives the Union and its members of rights secured by the laws and Constitution of the

United States. Thus, Federal subject matter jurisdiction also exists herein pursuant to 28 U.S.C. §1343.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO ISSUE AN INJUNCTION HEREIN

A preliminary injunction should have issued herein enjoining the use of impasse resolution procedures contained in New York Civil Service Law §209, because: A. The Union will succeed on the merits of the case; B. The Union will suffer irreparable harm if an injunction does not issue; and C. The Authority will suffer no harm if an injunction issues.

The District Court, however, refused to issue an injunction on the erroneous ground that the Union had waived its right to arbitration by participation in mediation. It is established hereinafter that the District Court's decision is erroneous as a matter of law and a clear abuse of discretion, warranting reversal by this Court.

A. The Union Will Succeed on the Merits of the Case.

In Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir. 1969), this Court ennunciated the cardinal rule that a preliminary injunction:

> [W]ill not be granted except upon a clear showing of probable success and possible irreparable injury.

It is submitted that the Union does present a case demonstrating a clear probability of success on the merits and as explained infra at pgs. 30-33, will suffer irreparable harm if an injunction does not issue.

The Union seeks herein to compel arbitration of their pending dispute with the Authority. That dispute concerns the terms to be incorporated into a new collective bargaining agreement. The Authority and the Union contractually agreed that they would arbitrate, among other things, all labor disputes concerning the terms to be incorporated into a new collective bargaining agreement. Thus, the Union will prevail on the merits of this case.

In United Steelworkers v. Warrior & Gulf Nav. Co., supra, 363 U.S. 574, 582, 46 LRRM 2416, 2419 (1960) (the second of the famous Steelworkers Trilogy cases), the Supreme Court observed that "arbitration is a matter of contract" and that the court's sole duty is to determine "whether the reluctant party has breached his promise to arbitrate." If the reluctant party has breached his promise, the court must then order arbitration.

Despite the clear import of these simple rules, it has been necessary to emphasize that the Supreme Court truly meant what it said. Thus, in Machinists v. General Electric Co., 406 F.2d 1046, 1048, 70 LRRM 2477, 2478-79 (2d Cir. 1969), this Court observed that:

> To resolve the issue of arbitrability, there is no need to rehearse the applicable law here at length; we have done so in the recent past. See, e.g., IUE v. General Electric Co., 407 F.2d 253 (2d Cir. 1968); ILA v. New York Shipping Ass'n., 403 F.2d 807 (2d Cir. 1968). It is enough to say that the authorities there quoted teach us that it is "national policy" to encourage arbitration of labor disputes, that doubts as to arbitrability should be "resolved in favor of covereage," that language excluding certain disputes from arbitration must be "clear and unambiguous" or "unmistakably clear," and that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." This is an imposing litany for the Company to overcome. [Emphasis added].

In the instant case, as the District Court found, a valid agreement does exist providing for arbitration, which covers the dispute between the parties. Section 9 of the 13(c) Agreement provides in relevant part that:

> In the case of any labor dispute where collective bargaining does not result in agreement, the same may be submitted at the written request of either party to a board of arbitration . . . .

In turn, "labor dispute" is defined, in part, as any controversy concerning:

> [T]he making or maintenance of collective bargaining agreements, the terms to be included in such agreements . . . any claim, difference, or controversy arising out of or by virtue of the provisions of this agreement . . . .

Thus, the District Court, on the hearing for a preliminary injunction, found that:

> [I]t is plain that under the very language of this agreement interest disputes of the kind that we have here looking to renewal or maintenance of collective bargaining agreement are clearly covered. Likewise, the Court feels confident that the very purpose of this 13(c) agreement is to assure that . . . labor disputes or disputes of this type . . . as well as others would be submitted to . . . binding arbitration, with a view that there be no interruption of the public service involved in all of these systems of mass transportation . . . .
>
> I therefore think that the union is entitled to go to arbitration in this matter . . . . [Emphasis added] [A 11-13].

It is clear, therefore, that the parties have agreed to arbitration over the making of a new collective bargaining agreement and over the terms to be included in the new agreement. Thus, the Union will prevail in its lawsuit and the dispute will be referred to arbitration.

The District Court, however, found that the Union would not succeed in its lawsuit, and thus denied the preliminary injunction sought. The court based its conclusion on the erroneous ground that, by participating in mediation, the Union had waived its right to arbitration.

The District Court's decision is erroneous because: (1) the parties have agreed to arbitrate equitable defenses to arbitration, including waiver; (2) the defense of waiver raises issues of procedural arbitrability, which are solely for the arbitrator; and, (3) the Union's participation in mediation is not, as a matter of law, a waiver of arbitration.

1. The Parties Have Agreed to Arbitrate Equitable Defenses to Arbitration, Including Waiver.

The parties have, in a broadly worded arbitration clause, agreed to arbitrate equitable defenses to arbitration. Thus, the District Court's reliance on waiver as a bar to arbitration is clearly erroneous.

In Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491, 80 LRRM 2441, 2442 (1972), the employer, as in the instant case, objected to arbitration on equitable grounds, to wit, laches. The Court held, however, that where the parties' agreement contained broadly worded arbitration clauses, they would be compelled to arbitrate equitable defenses to arbitration.

Thus, in Reid Burton Construction v. Carpenters, 535 F.2d 598, 603, 92 LRRM 2321, 2324 (10th Cir. 1976), the court observed that Flair Builders stands for the proposition that:

> [B]roadly-worded arbitration clauses require the arbitration of equitable defenses arising out of the formation of a collective bargaining agreement or the processing of a grievance, be they intrinsic procedural questions or extrinsic questions as defined by John Wiley & Sons, Inc. V. Livingston, 376 U.S. 543.

In Granny Goose Foods, Inc. v. Teamsters, ____ F.Supp. ____, 88 LRRM 2029, 2034 (N.D.Cal. 1974), the employer asserted that the union's alleged repudiation of the arbitration agreement barred arbitration. The agreement, however, provided for arbitration of:

> [a]ll grievances or questions of interpretations arising under this Master Agreement or Supplemental agreements thereto.

The court observed that:

> Generally, such provisions are interpreted to include all questions on which the parties disagree unless specifically excluded from arbitration. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 56 LRRM 2416 (1960).

And, therefore, held that the repudiation defense was an issue solely for the arbitrator. [See, also, Controlled Sanitation Corp. v. Machinists, 524 F.2d 1324, 90 LRRM 2892 (3rd Cir. 1975), cert. denied, 424 U.S. 915, 91 LRRM 2410 (1976); Local 1434, IBEW v. E.I. duPont Co., 350 F.Supp. 462, 81 LRRM 2678 (E.D.Virg. 1972); IUOE, Local 139 v. Carl A. Morse, Inc., 387 F.Supp. 153, 88 LRRM 2680 (E.D.Wisc. 1975).]

In the instant case, the arbitration clause clearly encompasses any dispute that may arise between the parties. The clause provides that either party may demand arbitration of a "labor dispute." The agreement, in turn, defines "labor dispute" by first admonishing that it "shall be broadly construed" and that the definition "shall include," among other things:

> [T]he interpretation or application of such agreements, the adjustment of grievances, any claim, difference, or controversy arising out of or by virtue of any of the foregoing provisions of this agreement . . . .

It is obvious that the parties intended to, and did, draft the broadest type of arbitration agreement they could conceive. One that would include the arbitration of any type of dispute.

Thus, pursuant to Flair Builders, supra, the Authority's waiver defense must be submitted to arbitration.

2. The Waiver Defense Raises Issues of Procedural Arbitrability, Which Are Solely for the Arbitrator.

The Authority's waiver defense is, essentially, that the Union should have employed a different procedure in moving this dispute to arbitration. Thus, the waiver defense raises issues of procedural arbitrability which must be submitted to arbitration, and cannot be decided by the courts.

In John Wiley & Sons v. Livingston, 376 U.S. 543, 557, 55 LRRM 2769, 2775 (1964), the Supreme Court held that:

> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

In the instant case, of course, the District Court has already determined that the parties are obligated to submit their dispute to arbitration. Thus, the Authority's procedural defense to arbitration must be submitted to arbitration.

It is relevant to note Mr. Justice (then Judge) Stevens' dissenting opinion in the Seventh Circuit decision in Operating Engineers v. Flair Builders, Inc., 440 F.2d 557, 561, 76 LRRM 2595, 2598 (7th Cir. 1971), reversed, 406 U.S. 487, 80 LRRM 2441 (1972). He observed that:

> The appropriateness of laches as a defense to a labor dispute involves a consideration of several questions which can best be answered by one who is familiar with the collective bargaining relationship between the parties.

This reasoning is particularly probative here, since the dispute goes to the entire relationship between the parties, i.e., a new collective bargaining agreement. Thus, the waiver issue herein "can best be answered by one who is familiar with the bargaining relationship between the parties," i.e., an arbitrator.

It is submitted, therefore, that the procedural defense of waiver is also an issue that must be submitted to arbitration.

3. The Union's Participation In Mediation Is Not, As a Matter of Law, A Waiver of the Right To Arbitration.

Regardless of the fact that the waiver issue is for the arbitrator, it is submitted that it cannot be found, as a matter of law, that the Union waived arbitration herein because: the Authority has failed to demonstrate prejudice; and the Urban Mass Transportation Act prohibits that result.

In order to establish the defense of waiver, the proponent must demonstrate that he has been prejudiced by the acts of his opponent. In this case, the Authority has not and cannot demonstrate prejudice. Thus, as a matter of law, no waiver of arbitration occurred.

In Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968), it was argued that defendant Cunard had waived contractual arbitration when it participated in pre-trial procedures in a

pending lawsuit. It was argued that Cunard:

> [S]hould have moved earlier for the stay [pending arbitration], and that it delayed for two years in order to be "in on" the longshoreman's suit. They insist that Cunard has acted inconsistently - it cannot "have it both ways."

This Court, however, rejected that argument, reasoning that:

> But this argument misses the mark. It is not "inconsistency," but the presence or absence of prejudice which is determinative of the issue. As an abstract exercise in logic it may appear that it is inconsistent for a party to participate in a lawsuit for breach of a contract, and later to ask the court to stay that litigation pending arbitration. Yet the law is clear that such participation, standing alone, does not constitute a waiver, Chatham Shipping Co. v. Fertex Steamship Corp., 352 F.2d 291, 293 (2d Cir. 1965) (filing complaint not waiver); Reynolds Jamaica Mines, Ltd. v. La Societe Navale Caennaise, 239 F.2d 689 (4th Cir. 1956) (asserting counterclaim not waiver); Rootes Motors, Inc. v. SS Carina, 1964 A.M.C. 2754 (S.D.N.Y. 1964) (filing answer without mentioning arbitration not waiver), for there is an overriding federal policy favoring arbitration. Waiver, therefore, is not to be lightly inferred, and mere delay in seeking a stay of the proceedings without some resultant prejudice to a party, Kulukundis, supra, cannot carry the day. [Emphasis added].

[See, also, ITT, Inc. v. Communications Workers, 422 F.2d 77, 73 LRRM 2244 (2d Cir. 1970); Local 198, Rubber Workers v. Interco, Inc., 415 F.2d 1208, 72 LRRM 2377, 2380 (8th Cir. 1969).]

In the instant case, the Authority has failed to establish that it has been prejudiced by the use of mediation services. (Mediation is, of course, employed in an effort to resolve disputes by collective bargaining.) Since, the Authority was not prejudiced by mediation, the Union cannot be held to have waived arbitration.

Finally, it is submitted that a holding that arbitration is waived by participation in mediation violates the Urban Mass Transportation Act. The Act, at Section 13(c), mandates "the continuation of collective bargaining rights." A holding that those collective bargaining rights are waived by participation in mediation is, thus, violative of the Act.*

Such a holding is also contrary to basic labor policy favoring arbitration as the means of resolving labor disputes [see, e.g., United Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 LRRM 2414 (1960)], and is contrary to the general federal policy favoring arbitration. [See, e.g., Carcich v. Rederi A/B Nordie, supra, 389 F.2d 692, 696 (1968), where this Court ob-

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* The legislative history of the Act makes it clear that federal grants cannot be made available where State law conflicts with collective bargaining rights. Senator Morse observed, in this regard, 88 Cong. Rec. 5684 (1963), that:

> In rare cases in which local law prohibits collective bargaining, Federal money would not be available, because it would be in conflict with the policy of the bill.

Furthermore, New York State law does not conflict with the Act, since the New York law specifically authorizes arbitration after mediation [New York Civil Service Law §209(3)(d)(ii)]. Additionally, the courts of New York do not recognize the so-called doctrine that participation in mediation is a waiver of arbitration [See, e.g., Susquehanna Valley Central School District v. Susquehanna Valley Teachers' Association, 46 A.D.2d 104, 88 LRRM 3320 (3rd Dep't. 1974), aff'd., 37 N.Y.2d 614, 90 LRRM 3046 (1975).

For a full discussion of the New York law, see POINT III, infra.

served that: "there is an overriding federal policy favoring arbitration. Waiver, therefore, is not to be lightly inferred . . . ."]

It is submitted, therefore, that the District Court erred as a matter of law in finding that the Union waived its right to arbitration; that the District Court abused its discretion in failing to issue a preliminary injunction; and that the District Court's decision must be reversed.

B. The Union Will Suffer Irreparable Harm If An Injunction Does Not Issue Herein.

If an injunction is not issued herein to maintain the status quo, the Union will be irreparably harmed. The irreparable harm will consist of the loss of collective bargaining rights (in violation of the Act) and the loss of the right to arbitration.*

The Union seeks to enjoin the Authority from using Section 209 of the New York Civil Service Law to impose a new collective bargaining agreement on the Union without its consent. As a result of the District Court's refusal to issue an injunction herein, the Authority is forcing the Union to participate in those Section 209 procedures.

Pursuant to Section 209, if the dispute cannot be voluntarily resolved after factfinding, the dispute will be "settled"

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* The Union is also suffering irreparable harm in expending substantial monies and time participating in factfinding, when the dispute must ultimately be resolved by arbitration.

when a new collective bargaining agreement is imposed, by the Authority, upon the Union without its consent.

1. Loss of Collective Bargaining Rights.

If a new "collective bargaining agreement" is imposed on the Union, without its consent, the Union will, a priori, suffer irreparable harm. Such an "agreement" will not have been obtained by collective bargaining, but by fiat. In such circumstances, the Union will have lost its rights to collective bargaining.

Collective bargaining is defined as:

> [T]he process whereby representatives of labor and management work out the wages, hours, and other terms and conditions to be embodied in an agreement that is to govern the relations of the parties for a specified period of time. [Roberts, Roberts' Dictionary of Industrial Relations 74 (Rev'd. ed. 1971)].

That process is at the core of our national labor policy [see, e.g., §1 of the Labor-Management Relations Act, 29 U.S.C. §151], and is the process that Section 13(c) of the Urban Mass Transportation Act is designed to protect.

Prior to the Authority's take over of the Syracuse and Eastern Transit Corporation (the past employer of the Union's members), the Union and its members possessed all of the rights associated with the term "collective bargaining" as defined under the Labor-Management Relations Act. [See, N.L.R.B. v. Baltimore Transit Co., 140 F.2d 51, 13 LRRM 739 (4th Cir. 1944)]. The 13(c)

Agreement herein, and particularly the interest arbitration clause, was entered into by the Authority to protect those collective bargaining rights. As Senator Morse observed, while pleading for the enactment of Section 13(c) of the Act:

> In my judgment, the Senate should, as a matter of public policy, adopt the Morse amendment, underwriting the basic principle that the Senate does not propose to take away from labor, in the Mass Transit Bill, hard-earned collective bargaining rights achieved over the years.
>
> . . .
>
> I am standing here fighting for the economic freedom of employers and Unions in this country to continue their collective bargaining arrangements without Congress creating a system of public ownership of transit systems which would override in a moment employee rights and interests established in a decade of free negotiation. [88 Cong. Rec. 5677 (1963)].

The Authority, however, if not enjoined by this Court, will impose a new "agreement" on the Union without bargaining. Section 209(3)(e)(i-iv) of the Civil Service Law provides that, if a dispute cannot be voluntarily resolved after factfinding:

> (i) the chief executive officer of the government involved shall, within ten days after receipt of the findings of fact and recommendations of the fact-finding board, submit to the legislative body of the government involved a copy of the findings of fact and recommendations of the fact-finding board, together with his recommendations for settling the dispute; (ii) the employee organization may submit to such legislative body its recommendations for settling the dispute; (iii) the legislative body or a duly authorized committee thereof shall forthwith conduct a public hearing at which the parties shall be required to explain their positions with respect to the report of the fact-

finding board; and (iv) thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved.* [Emphasis added].

Pursuant to Section 201(6)(a) of the Civil Service Law, the "government" herein is the Authority; the "legislative body of the government involved" is, therefore, the board of directors of the Authority.

The "settlement" of this dispute, pursuant to the Authority's procedure, is not collective bargaining and would therefore be illegal under Section 13(c) of the Act. It would also irreparably harm the Union by divesting it of its collective bargaining rights.

2. Loss of Right to Arbitrate.

If the Authority is permitted to impose a new collective bargaining agreement on the Union, it is submitted that the Union would lose its right to arbitrate over the terms to be included in that agreement. The imposed agreement would "settle" the dispute between the parties.

But it is the arbitrator's decision on the issue that the parties bargained for. The loss of the benefit of that bargain is irreparable harm.

It is submitted, therefore, that the Union will suffer irreparable harm if an injunction is not issued herein and that the District Court abused its discretion by not issuing the said injunction.

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* Section 209 of the New York Civil Service Law is reproduced in the Appendix to this Brief.

C. The Authority Will Suffer No Harm If An Injunction Issues Herein.

The Authority will not be harmed if an injunction issues herein, since such an order would not require the Authority to do anything. The injunction sought would merely enjoin the Authority from imposing a new collective bargaining agreement on the Union pending a determination of the Union's case. In the interim, the parties would, presumably, continue their relationship on the present terms.

Thus, the Authority will not be required to expend any monies nor alter its operations in any manner if an injunction issues. It is clear, therefore, that the Authority will suffer no harm whatever if an injunction issues herein.

It is submitted, therefore, that the District Court erred as a matter of law and abused its discretion by failing to issue an injunction herein. That decision must be reversed and an injunction must issue.

POINT II

THE FAILURE OF THE DISTRICT COURT TO RENDER A JUDGMENT COMPELLING ARBITRATION, BY CONSOLIDATING THE TRIAL ON THE MERITS WITH THE HEARING ON THE APPLICATION FOR A PRELIMINARY INJUNCTION, IS ERRONEOUS AS A MATTER OF LAW AND AN ABUSE OF DISCRETION

The consolidation of a trial on the merits with a preliminary injunction application is authorized by Rule 65(a)(2) of the Federal Rules of Civil Procedure. Consolidation should have been

ordered herein because all of the necessary facts to render a judgment on the merits, compelling arbitration, were before the District Court on the preliminary injunction application. It is submitted, therefore, that the court's failure to order consolidation and arbitration is reversible error.

A. This Court Should Render a Decision On the Merits of the Case.

Rule 65(a)(2) of the Federal Rules of Civil Procedure provides in relevant part that:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

Although this rule vests the District Courts with discretion to order consolidation, it is submitted that this Court can and should review the District Court's action and finally determine the merits of the case. As was observed in City of Owensboro v. Cumberland T. & T. Co., 174 F. 739, 747 (6th Cir. 1909):

> The only questions which arise under the special or limited appeal from an interlocutory decree granting a preliminary injunction are those which are necessarily involved by the allowance of the injunction pendente lite. If the court below had jurisdiction and did not unreasonably exercise its discretion in the granting of an injunction to preserve the status until a final hearing, this court will not ordinarily go into the merits of the case any farther than necessary to determine this question . . . . Nevertheless, if the transcript plainly exhibits the whole case, and the court is able, without injustice, to finally determine the entire merits of the case, it may do so. Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 CCA 13; Smith v. Vulcan Iron Works, 165 U.S. 518, 523, 17 Sup.Ct. 407, 41 L. ed 810. [Emphasis added].

It is demonstrated hereinafter that the record plainly exhibits the whole case. Thus, without prejudice, this Court can determine the entire merits of the case and order arbitration.

B. The Merits of this Case, Fully Exhibited on the Record, Demonstrate That Arbitration Must Be Compelled.

The merits of this case are really very simple. There are only two issues, to wit: whether the parties are bound by an agreement to arbitrate their disputes; and whether the instant dispute is covered by the agreement. [See, United Steelworkers v. American Mfg. Co., supra, 363 U.S. 564. 567-68, 46 LRRM 2414, 2415 (1960)].

The District Court correctly found that the 13(c) Agreement is a valid and enforceable agreement between the parties to arbitrate, and that the instant dispute is covered by that Agreement [A 11-13].

It is relevant to note that the District Court found, and the parties conceded, that there were no factual issues necessitating an evidentiary hearing [A 9]. This is particularly probative, for the only relevant issue on the merits of the case, i.e., whether the parties were bound by an agreement to arbitrate the instant dispute, was fully before the court on the preliminary injunction motion. And that issue was determined in favor of arbitration.

Thus, not only should the District Court have issued the preliminary injunction sought, but should have also ordered the entire dispute to arbitration. Instead, based upon the legally

and factually erroneous theory that the Union waived arbitration, the court refused to afford any relief to the Union.*

Although the matter should be resolved at this juncture, and arbitration ordered, it is necessary to discuss the import of the District Court's second decision, denying summary judgment motions. As discussed hereinafter, the District Court's summary judgment decision does not affect the conclusion that the entire dispute should have been referred to arbitration on the preliminary injunction application.

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* The District Court's subsequent opinion, on the Union's motion for a stay pending appeal, states that the injunction was denied because of the possible inconvenience to the public if an expeditious settlement of the dispute is not achieved. [A 302].

It is respectfully submitted that this assertion is belied by the District Court's two earlier opinions where no mention of inconvenience to the riding public was made as a reason for denying the injunction [A 6-15; 215-235].

Additionally, there is no probative evidence in the record of any potential inconvenience to the riding public herein. Furthermore, it is by protecting the Union's members' collective bargaining rights, i.e., by enforcing the 13(c) Agreement, that inconvenience to the riding public is avoided, as the District Court recognized in its first opinion [A 11]. In that opinion, the court observed that:

> [T]he Court feels confident that the very purpose of this 13(c) agreement is to assure that . . . labor disputes or disputes of this type . . . as well as others would be submitted to . . . binding arbitration, with a view that there be no interruption of the public service involved in all of these systems of mass transportation . . . that the public interest in uninterrupted services would be best preserved by compulsory arbitration. [Emphasis added].

See, also, 88 Cong. Rec. 5670 (1963), and the discussion supra, at pgs. 10-12.

Immediately after the District Court issued its decision denying the preliminary injunction, the Authority moved to dismiss the complaint and/or for summary judgment [A 183]. And, the Union cross-moved, also for summary judgment [A 188].

The District Court, in denying those motions, seemingly retreated from its earlier pronouncement that there were no triable issues of fact. The court identified four issues that it felt necessitated trial. None of those issues, it is submitted, can alter the conclusion that arbitration should have been ordered of the entire dispute.

The crux of the District Court's summary judgment opinion appears at page 229 of the Appendix. The court stated:

> But you have got a can of worms here with all kinds of issues of fact going to the intent of the parties, until the full meaning of all these agreements that are involved here, to whether the underlying collective bargaining agreement has expired, whether it is superceded by this tri-party agreement with Centro, whether there has been a waiver, which I found there had been preliminarily, sufficient to refute you for preliminary injunction.

Thus, the four issues that the court identified as requiring trial were: (1) the intent of the parties in entering into the agreements; (2) whether the underlying collective bargaining agreement has expired; (3) whether the 13(c) Agreement had been superceded; and (4) whether there had been a waiver of the right to arbitration. It is submitted that none of these matters can bar arbitration. Thus, no evidentiary hearing is necessary.

1. The Intent of the Parties Cannot Bar Arbitration.

The intentions of the parties in entering into the 13(c) Agreement is mandated by statute. Section 13(c) of the Act requires arrangements to be made to protect employees affected by federal assistance afforded under the Act. The agreement herein, therefore, was entered into with the intention of protecting the members of the Union.

It is also observed that the Authority cannot hope to avoid arbitration under the agreement by asserting some other intent. As the Supreme Court stated in United Steelworkers v. Warrior & Gulf Nav. Co., supra, 363 U.S. 574, 582-83, 46 LRRM 2416, 2419-20 (1960):

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

The instant agreement clearly provides for arbitration over the pending dispute. It provides for arbitration over:

> [T]he making or maintenance of collective bargaining agreements, the terms to be included in such agreements . . . any claim, difference, or controversy arising out of or by virtue of the provisions of this agreement . . . .

It is submitted, therefore, that further litigation over the parties' intention in entering into the 13(c) Agreement could not alter the conclusion that arbitration must be ordered.

2. Expiration of the Underlying Collective Bargaining Agreement Cannot Bar Arbitration.

It is submitted that the existence of the underlying collective bargaining agreement is totally irrelevant to the issue at bar. There exists no clause in the 13(c) Agreement that states or even implies that interest arbitration may not be had if a current collective bargaining agreement has not expired.*

As this Court observed in Machinists v. General Electric Co., supra, 406 F.2d 1046, 1048, 70 LRRM 2477, 2478-79 (2d Cir. 1969):

> [L]anguage excluding certain disputes from arbitration must be "clear and unambiguous" or unmistakably clear" . . . arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

In the instant case, there is no language--clear, unambiguous or otherwise--that excludes arbitration because a collective bargaining agreement has not expired.

It is noted that, if the District Court were alluding to the alleged expiration of the 13(c) Agreement, the result, i.e. ordering arbitration, would be the same. Under the parties' broad arbitration clause, an alleged dispute over the expiration of the 13(c) Agreement would also be arbitrable [See, e.g., Local 4, IBEW

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* Presumably, such arbitration would be over the agreement to replace the existing agreement upon its expiration.

In any event, the last collective bargaining agreement between the parties expired on November 1, 1976 [A 35].

v. Radio Thirteen-Eighty, Inc., 469 F.2d 610, 81 LRRM 2829 (8th Cir. 1972); see, also, Bressette v. International Talc Co., Inc., 527 F.2d 211, 215, 91 LRRM 2077, 2080 (2d Cir. 1975)].

Thus, any alleged issues over expiration of the collective bargaining agreement or of the 13(c) Agreement would not be a bar to arbitration.

3. Whether the 13(c) Agreement Has Been Superceded Cannot Bar Arbitration.

Among the myriad irrelevant defenses to arbitration raised by the Authority, is the clearly erroneous assertion that the 13(c) Agreement has been superceded by a National Agreement. A casual perusal of the National Agreement makes it abundantly clear that it did not supercede the 13(c) Agreement. Additionally, the National Agreement contains its own arbitration clause that covers the instant dispute.

The so-called National Agreement [A 106-119], provides that:

> (3) All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued; provided, however, that such rights, privileges and benefits which are not foreclosed from further bargaining under applicable law or contract may be modified by collective bargaining and agreement by the Recipient and the union involved to substitute other rights, privileges and benefits. Unless otherwise provided, nothing in this agreement shall be deemed to restrict any rights the Recipient may otherwise have to direct the working forces and manage its business

as it deems best, in accordance with the applicable collective bargaining agreement. [A 106].

(4) The collective bargaining rights of employees covered by this agreement, including the right to arbitrate labor disputes and to maintain union security and checkoff arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements, shall be preserved and continued. . . . [Emphasis added] [A 107].

A most important footnote is cited at the end of the last quoted sentence. That footnote provides that:

As an addendum to this agreement, there shall be attached where applicable the arbitration or other dispute settlement procedures or arrangements provided for in the existing collective bargaining agreements or any other existing agreements between the Recipient and the Union, subject to any changes in such agreements as may be agreed upon or determined by interest arbitration proceedings. [Emphasis added] [A 107].

Thus, not only is the 13(c) Agreement not superceded by the National Agreement, but the 13(c) Agreement herein is made a part of and incorporated into the National Agreement.

Finally, the National Agreement, at Section 15, provides for arbitration of any dispute arising thereunder, including, obviously, disputes over whether the National Agreement superceded any other agreement. That Section provides in relevant part that:

(15)(a) In the event there arises any labor dispute with respect to the protection afforded by this agreement, or with respect to the interpretation, application or enforcement of the provisions of this agreement, not otherwise governed by Section (12)(c) hereof, the Labor-Management Relations Act, as amended, Railway Labor Act, as amended, or by impasse resolution provisions in a collective bargaining or protective agreement involving the Recipient and the union, which cannot be settled by the parties thereto within thirty (30) days after the dispute or controversy arises, it may

be submitted at the written request of the Recipient or the union to a board of arbitration to be selected as hereinafter provided. [A 113-114].

Thus, a dispute over the impact of the National Agreement must also be resolved by arbitration.

4. The Waiver Defense Cannot Bar Arbitration.

The District Court's error with respect to its finding that the Union waived arbitration is fully discussed supra at pgs. 24-30. It should be added, however, that a doctrine providing for waiver of arbitration, due to participation in mediation, is particularly inappropriate in labor relations.* Mediation is merely a means of attempting voluntary resolution of labor disputes and, of course, is a preferred method of dispute settlement. Any doctrine, it is submitted, that would penalize parties for attempting such voluntary resolution is antithetical to peaceful labor relations and thus to national, and state, labor policy.

It is submitted, therefore, that further litigation of this case cannot alter the conclusion that arbitration must be ordered. Thus, by failing to consolidate the trial on the merits with the preliminary injunction application, the District Court committed reversible error. That error must be corrected by the issuance of a preliminary injunction and a judgment compelling arbitration of the entire dispute.

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* The role and impact of mediation in labor relations is described in Newman, Interest Arbitration - Practice and Procedure, 1977 ABA Section of Labor Relations Law, Labor Relations Section 44 (1977).

POINT III

PENDENT JURISDICTION SHOULD HAVE BEEN EXERCISED HEREIN TO ORDER THE ENTIRE DISPUTE TO ARBITRATION

The District Court possesses pendent jurisdiction over the Union's claim in this case. Pursuant to New York State Law, the entire dispute should have been immediately ordered to arbitration.

A. The District Court Possesses Pendent Jurisdiction Over the Union's Claim In This Case.

Pendent jurisdiction exists when a substantial federal claim is so related to a state claim that but one constitutional case is presented. As stated in United Mine Workers v. Gibbs, 383 U.S. 715, 725, 61 LRRM 2561, 2564 (1966):

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U. S. Const., Art. III, §2, and the relationship between that claim and the state claims made in the complaint permits the conclusion that the entire action before the court comprises but one constitutional "case." [Emphasis original].

The instant case to, inter alia, enforce the parties' agreement to arbitrate, arises under Section 13(c) of the Urban Mass Transportation Act and §1 of the Civil Rights Act of 1871.* It is a substantial federal claim.

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* This is also an action to enforce rights under §13(c) of the Urban Mass Transportation Act.

The state claim involved is also an action to compel arbitration pursuant to the laws of the State of New York. That claim and the federal claim, arising under the same operative facts, present but one constitutional case. Thus, pendent jurisdiction exists herein to order the dispute to arbitration pursuant to New York State Law.

B. The Instant Dispute Should Have Been Ordered to Arbitration Pursuant to New York State Law.

The instant dispute between the parties must be ordered to arbitration pursuant to New York law because: the parties are bound by an agreement to arbitrate; and the dispute is covered by that agreement. Additionally, it is observed that under New York law, a party does not waive arbitration by participation in mediation.

Preliminarily, it is observed that New York policy, as does federal policy, strongly favors arbitration as the means of labor dispute settlement. In fact, New York State has, both by case law and statute, adopted the federal principles of arbitrability.

In Matter of Long Island Lumber Co. (Martin), 15 N.Y.2d 380, 383, 59 LRRM 2237 (1965), a case concerning procedural arbitrability, the New York Court of Appeals adopted the Federal presumption of arbitrability. The Court stated:

> While it is Federal law that we apply in this case in reversing the orders made below which prevented arbitration, we point out that on this record and under the law of this State we would treat collective bargaining contract

> arbitration with like reasoning, and would reach the same result were we to apply our law. These orders must be reversed as we said because the procedural issue raised by the company is plainly arbitrable and the courts below should not have considered it. [Emphasis added].

Thus, in Susquehanna Valley Central School District v. Susquehanna Valley Teachers' Association, supra, 46 A.D.2d 104, 88 LRRM 3320, 3321 (3rd Dep't. 1974), aff'd., 37 N.Y.2d 614, 90 LRRM 3046 (1975), it was held that:

> If a valid agreement exists providing for arbitration, any controversy arising between the parties to the contract which is within the compass of these provisions must proceed to arbitration.

In further ennunciating the federal principles of arbitrability, under the Steelworker's Trilogy, 363 U.S. 564, 46 LRRM 2414 (1960) and progeny, as the law of New York State, the Susquehanna Court observed that:

> It has been repeatedly held that, where there is a broad arbitration clause in a collective bargaining agreement, there is a presumption that all questions arising thereunder are arbitrable and are questions for the arbitrator rather than the courts. (Matter of Associated Teachers of Huntington v. Board of Educ., Union Free School Dist. No. 3, Town of Huntington, 33 N.Y.2d 339; Matter of Long Is. Lbr. Co. [Martin]; 15 N.Y.2d 380; Matter of Exercycle Corp. [Maratta], 9 N.Y.2d 329; Board of Educ. of Chautauqua Cent. School Dist. v. Chautauqua Cent. School Teachers' Assn., 41 A.D.2d 47.) [Id., at 107, 88 LRRM, at ____].
>
> . . .
>
> The contract does not provide that such issue would be excluded from arbitration, and "it

> is only where the parties have employed language which clearly rebuts the presumption of arbitrability" (Matter of Long Is. Lbr. Co. [Martin], supra, p. 385) will the issue be held nonarbitrable. [Id., at 108, 88 LRRM, at 3321].

Finally, summing up the state of the law of arbitrability in New York, Judge Fuchsberg observed in City of Amsterdam v. Helsby, supra, 37 N.Y.2d 19, 40, 89 LRRM 2871, 2878 (1975) (concurring opinion), that:

> [W]e have repeatedly and emphatically indicated that arbitration is the preferred method of settling grievances . . . and have upheld such arbitration clauses against a variety of challenges . . . . [Emphasis added; citations omitted].

Statutorily, the New York State legislature expressed the preference for arbitrability in the Taylor Act [Sections 200 et. seq. of the New York Civil Service Law]. Thus, Section 1(c) of that Act [Civil Service Law, §200(c)] provides that:

> The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by . . .
>
> (c) encouraging . . . public employers and . . . employee organizations to agree upon procedures for resolving disputes . . . .

The statutory vehicle for carrying out that policy is found in Section 209 of the Civil Service Law. Subdivision 2 of that Section authorizes public employers to enter into:

> [W]ritten agreements with . . . employee organizations setting forth procedures to be invoked in the event of disputes which reach an impasse in the course of collective negotiations. Such agreements may include the undertaking by each party to submit unresolved issues to impartial arbitration.

In the instant case, the Authority and the Union entered into a written agreement to arbitrate, among other things, any dispute concerning:

> [T]he making or maintenance of collective bargaining agreements, the terms to be included in such agreements . . . any claim, difference, or controversy arising out of or by virtue of the provisions of this agreement . . . . [A 50].

And, the dispute concerns exactly that, i.e., the making of a collective bargaining agreement and the terms to be incorporated therein. Thus, pursuant to Susquehanna, supra, the dispute must be ordered to arbitration.

It is also observed that the theory espoused by the District Court, that the Union waived arbitration by participation in mediation, finds no support in New York law. In fact, Section 209(3)(d)(ii) of the Civil Service Law specifically authorizes interest arbitration after mediation, and even after factfinding, has been completed.

Section 209(3) of the Civil Service Law provides procedures for the resolution of contract disputes, in lieu of an agreement to arbitrate. That Section provides, in essence, that if an impasse is reached in negotiations, the Public Employment Relations Board may assist the parties in resolving the dispute. They do so

by providing, from a roster of private persons, a mediator and, if still necessary after mediation, a factfinder.*

It is relevant to observe that nothing prevents the parties from mutually agreeing upon the selection of a mediator, or for that matter a factfinder, through sources other than PERB. [Civil Service Law §209(2)].

If after factfinding, the dispute is still unresolved, PERB has the authority to assist the parties in resolving the dispute by arbitration. Section 209(3)(d)(ii) of the Civil Service Law, provides that:

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* Mediators, factfinders and arbitrators supplied by PERB are not PERB employees; PERB merely maintains, for the convenience of public employers and unions, lists of qualified persons who wish to serve in those capacities. Section 205(5)(h) and (i) of the Civil Service Law vests PERB with the powers and functions:

> (h) To make available to employee organizations, governments, mediators, fact-finding boards and joint study committees established by governments and employee organizations statistical data relating to wages, benefits and employment practices in public and private employment applicable to various localities and occupations to assist them to resolve complex issues in negotiations.
>
> (i) To establish, after consulting representatives of employee organizations and administrators of public services, panels of qualified persons broadly representative of the public to be available to serve as mediators, arbitrators or members of fact-finding boards.

The fees charged by the selected mediator, factfinder, and/or arbitrator, are paid by the parties; not by PERB.

> [T]he public employment relations board shall have the power to take whatever steps it deems necessary to resolve the dispute, including . . . (ii) upon the request of the parties, assistance in providing for voluntary arbitration.

Pursuant to that Section of the law, the PERB Rules and Regulations provides:

> §205.2 Voluntary interest arbitration
>
> (a) In the event that a public employer and a certified or recognized employee organization agree to submit any unresolved issue in negotiations to arbitration, they may request the assistance of the board in providing for such arbitration by a letter directed to the director of conciliation.
>
> (b) The written request may be initiated by either party and shall be accompanied by a copy of the submission.
>
> (c) An arbitrator shall be designated pursuant to the selection process established by the director of conciliation, which process will give the parties an opportunity to participate in the selection of the arbitrator.

Thus, in Susquehanna Valley Central School District v. Susquehanna Valley Teachers' Association, supra, 46 A.D.2d 104, 108, 88 LRRM 3320, 3321-22 (3rd Dep't. 1974), aff'd., 37 N.Y.2d 614, 90 LRRM 3046 (1975), arbitration was ordered over a term to be incorporated into a new collective bargaining agreement, even after mediation, factfinding and other PERB procedures had been completed. The court observed that:

> Petitioner's argument that the issue relating to the salary structure for the school year 1973-1974 is not subject to arbitration since the contract provided for negotiation of that issue by a joint committee subject to further negotiation under the Taylor Law fails in light of the grievance proce-

> dures contained in the contract. The contract does not provide that such issue would be excluded from arbitration, and "it is only where the parties have employed language which clearly rebuts the presumption of arbitrability" (Matter of Long Is. Lbr. Co. [Martin], supra, p. 385, 59 LRRM p. 2238) will the issue be held nonarbitrable. [Emphasis added].

Finally, it is observed that New York law, as does federal law, provides for arbitration of equitable defenses, such as waiver. See, e.g., Zeller v. Board of Higher Education, 91 LRRM 2854, 2855 (N.Y.Sup.Ct. N.Y. Co., 1975), where the employer sought to stay arbitration due to laches, abandonment, and timeliness of the demand for arbitration, the court held that:

> [T]hese issues are essentially procedural when considered within the perspective of the entire arbitration process. It is not the policy of this court to address itself to such questions when they have not been put to the presiding arbitrator in the first instance.
>
> . . .
>
> It is clear that the issues raised by the respondent are more properly addressed to the arbitrator than to this Court at this time; Long Island Lumber Co. Inc. v. Martin, 15 N.Y.2d 380, 59 LRRM 2237.

It is clear, therefore, that neither under the Taylor Act nor under New York case law, is participation in mediation a waiver of arbitration. Thus, under New York law, as under Federal law, all of the necessary issues to compel arbitration were before the District Court on the preliminary injunction application. Since all of the relevant issues were and/or should have been resolved in favor of immediate arbitration, the District Court erred as a matter of law by failing to order arbitration.

CONCLUSION

For all of the foregoing reasons and authorities, it is respectfully submitted that the order of the District Court, denying the Union's motion for a preliminary injunction, must be reversed and that:

1. A preliminary injunction must issue herein enjoining factfinding and enjoining the Authority from imposing upon the Union a resolution of the dispute; and

2. Judgment must issue ordering the entire dispute to arbitration.

Respectfully submitted,

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A P P E N D I X

NEW YORK CIVIL SERVICE LAW §209

NEW YORK CIVIL SERVICE LAW SECTION 209.

§ 209. Resolution of disputes in the course of collective negotiations

1. For purposes of this section, an impasse may be deemed to exist if the parties fail to achieve agreement at least one hundred twenty days prior to the end of the fiscal year of the public employer.

2. Public employers are hereby empowered to enter into written agreements with recognized or certified employee organizations setting forth procedures to be invoked in the event of disputes which reach an impasse in the course of collective negotiations. Such agreements may include the undertaking by each party to submit unresolved issues to impartial arbitration. In the absence or upon the failure of such procedures, public employers and employee organizations may request the board to render assistance as provided in this section, or the board may render such assistance on its own motion, as provided in subdivision three of this section,

[1]*or, in regard to officers or members of any organized fire department of any county, city, except the city of New York, town, village or fire district, as provided in subdivision four of this section.*

[2]**or, in regard to officers or members of any organized police force or police department of any county, city, except the city of New York, town, village or police district, as provided in subdivision four of this section.**

3. On request of either party or upon its own motion, as provided in subdivision two of this section, and in the event the board determines that an impasse exists in collective negotiations between such employee organization and a public employer as to the conditions of employment of public employees, the board shall render assistance as follows:

(a) to assist the parties to effect a voluntary resolution of the dispute, the board shall appoint a mediator or mediators representative of the public from a list of qualified persons maintained by the board;

(b) if the impasse continues, the board shall appoint a fact-finding board of not more than three members, each representative of the public, from a list of qualified persons maintained by the board, which fact-finding board shall have, in addition to the powers delegated to it by the board, the power to make public recommendations for the resolution of the dispute;

(c) if the dispute is not resolved at least eighty days prior to the end of the fiscal year of the public employer or by such other date determined by the board to be appropriate, the fact-finding board, acting by a majority of its members, (i) shall immediately transmit its findings of fact and recommendations for resolution of the dispute to the chief executive officer of the government involved and to the employee organization involved, (ii) may thereafter assist the parties to effect a voluntary resolution of the dispute, and (iii) shall within five days of such transmission make public such findings and recommendations;

(d) in the event that the findings of fact and recommendations are made public by a fact-finding board appointed by the board or established pursuant to procedures agreed upon by the parties under subdivision two of this section, and the impasse continues, the public employment relations board shall have the power to take whatever steps it deems appropriate to resolve the dispute, including (i) the making of recommendations after giving due consideration to the findings of fact and recommendations of such fact-finding board, but no further fact-finding board shall be appointed and (ii) upon the request of the parties, assistance in providing for voluntary arbitration;

(e) [1]except for recommendations of a fact-finding board applicable to a dispute involving public employees who are officers or members of any organized fire department of any county, city, except the city of New York, town, village or fire district, should

(e) [2]except for recommendations of a fact-finding board applicable to a dispute involving public employees who are officers or members of any organized police force or police department of any county, city, except the city of New York, town, village or police district, should

either the public employer or the employee organization not accept in whole or in part the recommendations of the fact-finding board, (i) the chief executive officer of the government involved shall, within ten days after receipt of the

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[1] *The matter in italic was added by Chapter 724, Laws of 1974.*

[2] **The matter in bold face was added by Chapter 725, Laws of 1974.**

findings of fact and recommendations of the fact-finding board, submit to the legislative body of the government involved a copy of the findings of fact and recommendations of the fact-finding board, together with his recommendations for settling the dispute; (ii) the employee organization may submit to such legislative body its recommendations for settling the dispute; (iii) the legislative body or a duly authorized committee thereof shall forthwith conduct a public hearing at which the parties shall be required to explain their positions with respect to the report of the fact-finding board; and (iv) thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved.

(f) Where the public employer is a school district, a board of cooperative educational services, a community college, the state university of New York, or the city university of New York, the provisions of subparagraphs (iii) and (iv) of paragraph (e) of this subdivision shall not apply, and (i) the board may afford the parties an opportunity to explain their positions with respect to the report of the fact-finding board at a meeting at which the legislative body, or a duly authorized committee thereof, may be present; (ii) thereafter, the legislative body may take such action as is necessary and appropriate to reach an agreement. The board may provide such assistance as may be appropriate.

4. On request of either party or upon its own motion, as provided in subdivision two of this section, and in the event the board determines that an impasse exists in collective negotiations between such employees organization and a public employer as to the conditions of employment of

[1]*officers or members of any organized fire department of any county, city, except the city of New York, town, village or fire district,*

[2]**officers or members of any organized police force or police department of any county, city, except the city of New York, town, village or police district,**

the board shall render assistance as follows:

(a) to assist the parties to effect a voluntary resolution of the dispute, the board shall appoint a mediator from a list of qualified persons maintained by the board;

(b) if the mediator is unable to effect settlement of the controversy within fifteen days after his appointment, either party may, by written notification to the other, request that their differences be submitted to fact-finding with advisory recommendations. Within ten days after receipt of such written request, the parties shall select a person to serve as fact finder. If they are unable to agree upon a fact finder, either party may request the board to appoint a fact finder from a list of qualified persons maintained by the board, which fact finder shall have, in addition to the powers delegated to him by the board, the power to make public advisory recommendations for the settlement of the dispute. The fact finder shall, within ten days after his appointment, meet with the parties or their representatives, or both, either jointly or separately, and may make inquiries and investigations, hold hearings, and take such other steps as he may deem appropriate. If the dispute is not settled within thirty days after his appointment, the fact finder shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only;

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[1] *The matter in italic was added by Chapter 724, Laws of 1974.*

[2] **The matter in bold face was added by Chapter 725, Laws of 1974.**

NEW YORK CIVIL SERVICE LAW SECTION 209.

(c) (i) if the dispute is not resolved within ten days after submission of the fact finder's report to the board, the board shall refer the dispute upon petition of either party to a public arbitration panel as hereinafter provided;

(ii) the public arbitration panel shall consist of one member appointed by the public employer, one member appointed by the employee organization and one public member appointed jointly by the public employer and employee organization who shall be selected within ten days after receipt by the board of a petition for creation of the arbitration panel. If either party fails to designate its member to the public arbitration panel, the board shall promptly, upon receipt of a request by either party, designate a member associated in interest with the public employer or employee organization he is to represent. Each of the respective parties is to bear the cost of its member appointed or designated to the arbitration panel and each of the respective parties is to share equally the cost of the public member appointed jointly. If, within seven days after the mailing date, the parties are unable to agree upon the one public member, the board shall submit to the parties a list of qualified, disinterested persons for the selection of the public member. Each party shall alternately strike from the list one of the names with the order of striking determined by lot, until the remaining one person shall be designated as public member. This process shall be completed within five days of receipt of this list. The parties shall notify the board of the designated public member. The cost of the one person designated as public member from the list submitted by the board is to be paid by the board. The public member shall be chosen as chairman;

(iii) the public arbitration panel shall hold hearings on all matters related to the dispute. The parties may be heard either in person, by counsel, or by other representatives, as they may respectively designate. The parties may present, either orally or in writing, or both, statements of fact, supporting witnesses and other evidence, and argument of their respective positions with respect to each case. The panel shall have authority to require the production of such additional evidence, either oral or written, as it may desire from the parties;

(iv) all matters presented to the public arbitration panel for its determination shall be decided by a majority vote of the members of the panel. The panel, prior to a vote on any issue in dispute before it, shall, upon the joint request of its two members representing the public employer and the employee organization respectively, refer the issues back to the parties for further negotiations;

(v) the public arbitration panel shall make a just and reasonable determination of the matters in dispute. In arriving at such determination, the panel may, but shall not be bound to, adopt any recommendation made by the fact finder, and shall, so far as it deems them applicable, take into consideration the following and any other relevant circumstances:

a. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities.

b. the interests and welfare of the public and the financial ability of the public employer to pay;

c. comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training and skills;

d. such other factors which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment.

(vi) the determination of the public arbitration panel shall be final and binding upon the parties for the period prescribed by the panel, but in no event shall such period exceed two years from the termination date of any previous collective bargaining agreement or if there is no previous collective bargaining agreement then for a period not to exceed two years from the date of determination by the panel. Such determination shall not be subject to the approval of any local legislative body or other municipal authority.

Affidavit of Service.

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(X)he personally served three (3) copies of the printed ☐ Record [2] Brief [1] Appendix of the above entitled case addressed to:

AXENFELD, WEBB, MARSHALL,
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[X] By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York, on ~~March 31, 1977~~ April 1, 1977.

☐ By hand delivery

Everett J. Rea
EVERETT J. REA

Sworn to before me this 31, day of March, 1977.

Notary Public
Commissioner of Deeds

cc: Blitman & King, Esqs.